

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
DePUY MITEK, INC.,	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 04-12457-PBS
	)	
ARTHREX, INC. and	)	
PEARSALLS LTD.	)	
Defendants.	)	
_____	)	

**MEMORANDUM AND ORDER**

July 3, 2007

Saris, U.S.D.J.

After hearing, I **DENY** Defendants' motion for summary judgment of non-infringement and Plaintiff's motion for summary judgment of infringement because there are disputed issues of fact as to whether the FiberWire's coating materially affects the novel and basic characteristics of the invention.

Defendants have pointed to language in the specification of the Hunter patent as well as other documents to demonstrate that it has become a common industry practice to coat sutures to improve the handleability and other characteristics. While not disputing industry practice, Plaintiff has submitted evidence that FiberWire's particular coating did not have a material effect on handleability and pliability. See Declaration of Dr. David Brookstein, ¶¶47-49 (Docket 63-4) (pointing out that FiberWire has a "very small amount of coating" that is

"unmeasurable"); Deposition Testimony of Defendant's Expert Dr. Burks (Tr. 96-97) (describing differences between treated and untreated sutures as "subtle" and acknowledging that surgical gloves would make a difference "in his confidence level" in distinguishing between coated and uncoated sutures).

Neither party's evidence was compelling. Arthrex never submitted an expert opinion on the effect of its own coating, and Dr. Brookstein did not conduct such tests either. However, Dr. Burks, a surgeon with relevant practical experience, testified about the differences between the uncoated and coated FiberWire sutures after feeling them (without gloves). His testimony on that point is more supportive of Plaintiff's position than otherwise. Accordingly, based on this record, I find there are disputed issues of material fact.

I will address the fallback summary judgment issues - Defendants' arguments on tipping and the reverse doctrine of equivalents - at a later time, but for the reasons mentioned in Court, they are unlikely to be winners.

**S/PATTI B. SARIS**

United States District Judge